earnest, as it was called, under a contract, in the form of a receipt for the deposit, entered into between the parties for the sale by the defendant to the plaintiff of a house in Kuala Lumpur.

The defendant opposed the plaintiff's claim on the ground, to put it very shortly, that the bargain had gone off through the plaintiff's default and that circumstances had accordingly arisen in which he was entitled to forfeit the deposit. The defendant's case as ultimately developed in court rested, their Lordships think, substantially on the contention that the plaintiff had repudiated his bargain because he came to the conclusion that the price he had agreed to pay was too high. Indeed, it was said by the defendant that a particular interview of the 29th February, 1956, the plaintiff had definitely refused to complete.

An appreciation of the case demands a somewhat detailed consideration of the correspondence, and, indeed, it was referred to in great detail and with great care by Mr. Khambatta, who said all that possibly could be said on the defendant's behalf. As to the interview of the 29th February, assuming in the defendant's favour that it ever took place at all, their Lordships are quite satisfied from the subsequent correspondence that there was nothing in the nature of a repudiation at that interview. Looking at the documents and the evidence as a whole, it appears to their Lordships that the plaintiff was in fact at all times ready and willing to complete, but he stipulated, naturally enough, that before he did complete the title should be investigated by his lawyer. The learned judge in the High Court unfortunately did not deliver himself of a judgment from which the Court of Appeal could derive the assistance which an Appellate Court is entitled to expect from a judge of first instance. The learned judge said this: "I have considered the case for plaintiff and that for defendant. I am not without some sympathy for the plaintiff as the case has turned out for him, but in law and in fact I am satisfied that the transaction could, would and should have been completed at defendant's solicitor's office. That this was not done was due to plaintiff's resiling from his contract with defendant because he felt he had entered into a bad bargain." Their Lordships cannot regard that judgment as of any assistance either on the facts or on the law.

The plaintiff appealed to the Court of Appeal at Kuala Lumpur, and that court reversed the decision of the trial judge and gave the plaintiff the relief claimed. Mr. Khambatta has emphasised the principle that the greatest respect should be paid to the findings of fact of a judge of first instance, based on seeing and hearing the witnesses and forming an estimate of their credibility, and there is no doubt as to that principle; but it is a principle impossible of application where, as in the present case, the learned judge has unfortunately failed to make any intelligible findings of fact at all. The Court of Appeal felt obliged to go into the matter *de novo*, as their Lordships think quite rightly, and, having done so, came to the conclusion that the plaintiff's case was made good and that the defendant's allegations of repudiation were ill founded. It appears to their Lordships that the judgments of the Court of Appeal are impeccable both in their reasoning and their conclusion, and their Lordships see no reason whatever for disturbing the order made.

Accordingly, their Lordships will report to the Head of the Federation of Malaya as their opinion that this appeal ought to be dismissed, and the appellant ought to pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Bannon & Bailey; Shearn Delamore & Co.*

MEK v. HAJI AHMAD

[C. A. (Thomson C.J., Good J.A., Smith J.) December 4, 1959]

[Penang — F.M. Civil Appeal No. 16 of 1959]

Mortgage — Transfer of land — Death of subsequent mortgagees — Whether action for recovering of land — Limitation — Period of — Limitation Enactment (Kedah), ss.26 and 33.

Sometime in 1926 the respondent (plaintiff and registered proprietor of four pieces of land in Kedah) charged two of the four pieces in favour of one Odyappa Chettiar. Later he charged the remaining two to him. On May 19, 1936, all four pieces of land were transferred by Odyappa Chettiar to Man and Siah both now deceased.

On July 14, 1936, an agreement was made between the plaintiff on the one side and Man and Siah on the other in which the latter agreed to transfer the land to the plaintiff on payment of the sum of $1,300 to be paid within 5 years.

The respondent contended that about two years after July 14, 1936, he paid the $1,300. He obtained possession of the titles relating to two pieces of the land but went into possession of all four pieces of land. However the two pieces comprising No. 30415 & 30416 in Surat Putus were not transferred to him.

On the death of Siah and Man (who died on September 5, 1940 and November 10, 1944 respectively) the respondent applied for letters of administration in respect of the estate of Siah and obtained on March 12, 1941 and on September 15, 1957, the appellant (defendant) obtained letters of administration in respect of the estate of Man.

On August 12, 1958, the plaintiff commenced the present proceedings against the defendant as administratrix of the estate of Man asking for performance of the agreement dated July 14, 1936 in so far as that agreement entitled him to have transferred back to him the land comprised in Surat Putus Nos. 30415 & 30416. The trial Judge found as a fact that the whole of the $1,300 had been paid by the plaintiff and he accordingly gave judgment in his favour and that he was not barred by the Statute of Limitations. The defendant appealed.

Held, allowing the appeal: the Kedah Limitation Enactment applied and the present proceedings were statute barred.

Case referred to:—

(1) *Ponnusamy & Anor.* v. *Nathu Ram* [1959] M.L.J. 86.

COURT OF APPEAL.

S. Thillaimuthu for appellant.

Chang Min Tat for respondent.

Thomson C.J.: The plaintiff in this case was at one time the registered proprietor of four pieces of land in the State of Kedah. The land in question is comprised in Surat Putus Nos: 30415, 30416, 669 and 671 and situated in the Mukim of Sala Besar.

Some time in 1926 the plaintiff charged two of the pieces of land (S.P. 30415 and 30416) to one Karappan Chettiar and on 16th September, 1929, he executed a second charge on these pieces of land in favour of Odyappa Chettiar. On 27th August, 1930, he charged the other two pieces of land (S.P. 669 and 671) to Odyappa Chettiar and on 29th September, 1930, he executed a further charge on these two pieces of land also in favour of Odyappa Chettiar. On various dates in 1935 all the charges on the four pieces of land were discharged and all four pieces of land were transferred to Odyappa Chettiar. Then on 19th May, 1936, all four pieces of land were transferred by Odyappa Chettiar to Man bin Haji Saad and Siah binti Hassan, both of whom are now dead.

On 14th July, 1936, an agreement was made between the plaintiff on the one side and Man and Siah on the other which recited that the four pieces of land had been sold to Man and Siah for $1,300 and by which they agreed to transfer the land to the plaintiff if the sum of $1,300 was paid by him to them within five years of the date of the agreement, that is, reckoning in Gregorian years not later than 14th July, 1941. I pause here to observe that what we are concerned with is clearly a moneylending transaction, or rather a series of moneylending transactions, although I do not think the point is of any great importance.

It was the plaintiff's case that about two years after 14th July, 1936, he paid the $1,300. Thereupon he says that Man and Siah transferred back to him the land comprised in Surat Putus Nos: 669 and 671, although in fact the land comprised in Surat Putus No: 671 was transferred to Siah's daughter Mek Aah for reasons as to which the evidence is wholly silent. At the same time he obtained possession of the titles relating to these two pieces of land. On his own story he went into possession of all four pieces of land but the two pieces comprised in Surat Putus Nos: 30415 and 30416 were not transferred to him. His explanation of this was that the Government had acquired part of these two pieces of land to build a school and presumably, although he did not say so, the parties were waiting for new titles to be issued in respect of so much of the land as had not been acquired.

Be that as it may nothing was done for a very long time. Siah died on 5th September, 1940, and Man died on 10th November, 1944. On a date which does not appear in evidence but which must have been subsequent to 5th September, 1940, the date of Siah's death, the plaintiff as a creditor applied for Letters of Administration in respect of the estate of Siah which were granted on 12th March, 1941, and on 15th September, 1957, the present defendant obtained Letters of Administration in respect of the estate of Man.

On 12th August, 1958, the plaintiff commenced the present proceedings against the defendant as Administratrix of the estate of Man asking for performance of the agreement dated 14th July, 1936, in so far as that agreement entitled him to have transferred back to him the land comprised in Surat Putus Nos: 30415 and 30416.

The defendant's case was that she knew nothing of the transactions between the plaintiff on the one hand and Siah and Man on the other hand and that in any event the plaintiff's claim was barred by limitation.

The trial Judge was of the opinion that the plaintiff's case was not barred by limitation. He found as a fact that the whole of the $1,300 had been paid by the plaintiff and he accordingly gave judgment in his favour as prayed. Against that decision the defendant has now appealed.

The trial Judge's finding that the whole of the $1,300 was paid has not been attacked before us and must be accepted. The important point, however, in considering the question of limitation is not whether or not the money was paid but when it was paid and on this point the trial Judge came to no conclusion.

The plaintiff's evidence, although he was not clear as to whether he paid in one or two instalments, was that the whole amount was paid two years after the original loan. That would be some time in 1938. An examination of the titles which are in evidence shows that the transfer of Surat Putus No: 669 to plaintiff is dated 15th April, 1937, and that the transfer of Surat Putus No: 671 to Mek Aah is dated 14th June, 1939. It is unlikely that these transfers were executed before the money was paid and in the circumstances it would appear that the only safe conclusion is that if the money was paid in full, as at this stage we must assume it was, it was so paid not later than 14th June, 1939.

The learned trial Judge based his view that the plaintiff's claim was not barred by limitation on the consideration that he (the plaintiff) had been in possession of the land and of the titles to it during the relevant period. With respect, that view would seem to overlook the fact that it was not the plaintiff who was seeking to set up limitation against the defendant but the defendant who was seeking to set it up against the plaintiff.

In my view the question can be disposed of as follows.

The relations between the parties arose from the provisions of the agreement of 14th July, 1936. Under that agreement when the plaintiff

paid the $1,300 Man and Siah became subject to the obligation to re-transfer the land to him. That was the time for the performance of the obligation and it was for the performance of that obligation under the contract that the plaintiff brought the present proceedings. In the circumstances it seems clear to me that the proceedings were subject to the provisions of section 22 of the Kedah Limitation Enactment. That Enactment was repealed by the Federation Limitation Ordinance which came into force on 19th February, 1953, but section 34 of that Ordinance expressly provides that nothing in it is to enable any action to be brought which was barred before its commencement by any Enactment repealed by it.

Section 22 of the Kedah Enactment reads as follows:—

"No suit for the specific performance of a contract shall be brought after the expiration of three years to be calculated from the time fixed for the performance, or where no such time is fixed from the time when performance is demanded and refused."

It is to be noted that by section 33 the calculation of time is to be made according to the Muslim calendar, under which the year is 354 or 355 days according as to whether it is a *kabisat* year. Reckoning from 14th June, 1939, the period of three years prescribed by the section would have expired on some date in April, 1942. By reason, however, of the Limitation (Enemy Occupation) Ordinance, 1946, and the Moratorium Proclamation (Repeal) Ordinance, 1949, limitation did not run from 1st January, 1942, until 1st October, 1949. In the present case, therefore, the period expired about the middle of 1950 (it is unnecessary to calculate the precise date) when the Kedah Enactment was still in force and the present proceedings were not commenced until 12th August, 1958. In my view then, the present proceedings were barred by limitation.

I would add that I am not unmindful of the argument of Counsel for the respondent that by reason of the decision of this Court in *Ponnusamy & anor.* v. *Nathu Ram*[1] this was an action for the recovery of land and that therefore by reason of the provisions of the Limitation Ordinance the period of limitation was six years. Alternatively he argued that whether or not the obligation arose *ex contractu* there was also an equitable obligation to transfer the land and here again, but in this case by reason of section 26 of the Kedah Enactment, the period of limitation was six years. Frankly I think there is very little substance in either argument. I do not, however, propose to discuss the points at length for by reason of section 33 of the Kedah Enactment, which has already been mentioned, calculations for the purposes of it are to be made according to the Mohammedan calendar. Calculating according to that calendar and making allowance for the suspension of limitation during the war a period of six years from 14th June, 1939, expired on 8th January, 1953, that is before the repeal of the Kedah Enactment and some years before the commencement of the present proceedings.

I would allow the present appeal with costs here and in the Court below and order that the deposit in Court be paid out to the appellant.

Good J.A. and **Smith J.** concurred.

Appeal allowed.

THE COMPTROLLER OF INCOME TAX, SINGAPORE v. DIA SINGH

[C. A. (Rose C.J., Chua and Wee Chong Jin JJ.) December 17, 1959]

[Singapore — Civil Appeal No. 22 of 1959]

Practice and Procedure — Appearance — Whether an Assistant Comptroller of Income Tax may appear on behalf of the Comptroller under s.90 of the Income Tax Ordinance (Cap. 166) — "May appear personally" — Meaning of.

Bankruptcy — Petition — Whether Assistant Comptroller of Income Tax may present petition under s.4 of the Bankruptcy Ordinance (Cap. 11) — "Creditor" in income tax matters.

In this appeal two points arose, (i) whether an Asst. Comptroller of Income Tax may appear on behalf of the Comptroller under section 90 of the Income Tax Ordinance; and (ii) whether an Asst. Comptroller of Income Tax may present a petition under section 4 of the Bankruptcy Ordinance read together with section 90(1) of the Income Tax Ordinance.

Held: (1) having regard to the definition of "Comptroller" in section 2 of the Income Tax Ordinance, a Dy. Comptroller or an Asst. Comptroller of Income Tax is included in the term Comptroller in section 90(2) of the Income Tax Ordinance and may appear on the Comptroller's behalf. The adverb "personally" in section 90(2) of the Ordinance is used in antithesis to "by counsel" and does not bear the implication that the Comptroller must appear in person;

(2) in income tax matter the "creditor" is the Comptroller of Income Tax, and for the purpose of the Bankruptcy Ordinance no other person can be included in this term.

COURT OF APPEAL. Appeal from the decision of Ambrose J.

B. J. Jeyaretnam (Crown Counsel) for the appellant.

Respondent did not appear.

Cur. Adv. Vult.

Rose C.J.: Two points arise in this appeal. First, may an Assistant Comptroller of Income Tax appear on behalf of the Comptroller under section 90 of the Income Tax Ordinance?

Subsection (2) of the section reads as follows:—

"The Comptroller may appear personally or by counsel in any suit instituted under this section."

In section 2 of the Ordinance "Comptroller" is defined as meaning "the Comptroller appointed under section 5 of this Ordinance and includes, for all purposes of this Ordinance except the exercise of the powers conferred upon the Comptroller by sections 95, 96 and 99 of this Ordinance, a Deputy Comptroller or an Assistant Comptroller so appointed."

Having regard to this definition I consider that a Deputy Comptroller or an Assistant